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No. 03-1699

IN THE
SUPREME COURT OF THE UNITED STATES

FRED SETTOON, INC., ET AL.
Petitioners,
v.
MICHAEL GROS,
Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a compensation order awarding benefits for a worker's injury under the Longshore and Harbor Workers' Compensation Act, without addressing whether the worker was a "member of the crew of [a] vessel" excluded from the Act's "coverage," forecloses the worker from asserting in a proceeding under the Jones Act and general maritime law that he *was* a "crew member."

2. Whether the ALJ who decided Gros's Longshore Act claim made a potentially preclusive finding that Gros's work aboard vessels during some relevant period amounted to no more than ten percent of his work time.

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BRIEF ROR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the Louisiana Supreme Court denying discretionary review (Pet. App. 66) is reported at 871 So.2d 372. The opinion of the Louisiana Court of Appeal for the Third Circuit (Pet. App. 1-11) is reported at 865 So.2d 143. The order of the 16th Judicial District Court of Louisiana dismissing Plaintiff-Respondent Gros's seaman's claims, and designating that partial summary judgment a "final judgment" under La. Code Civ. Proc. Ann. art. 1915.B(1) (Pet. App. 12-13), is unreported.

The decision and order of the administrative law judge making an award in the Longshore Act proceedings (Pet. App.26-65) is unreported, but is available at the Department

of Labor's website at http://www.oalj.dol.gov/DMSSearch-/CaseDetails.cfm?CaseId=198484.

JURISDICTION

The Order of the Louisiana Supreme Court was entered on March 26, 2004 (Pet. App. 66). The petition for a writ of certiorari was filed on June 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

1. The Jones Act, 46 U.S.C. App. § 688, provides a "seaman" injured in the course of his or her employment with a negligence cause of action against the employer. Injured seamen are also entitled under the maritime common law, among other remedies, to recover damages for "unseaworthiness" – unfitness of the vessel, her appurtenances, her staffing, and even her operational practices. *E.g.*, 2 Martin J. Norris, *Law of Seamen* §§ 27.4-.16 (5th ed. 2003).

The Longshore and Harbor Workers' Compensation Act[1] imposes no-fault liability on the employer, for medical benefits and for periodic benefits for disability or death of an "employee" that results from an injury occurring "upon the navigable waters of the United States" (as extended to include certain shoreside areas). Longshore Act §§ 3(a), 7-9, 33 U.S.C. §§ 903(a), 907-909. As a general proposition, the Longshore Act forecloses tort remedies against an insured employer, and also recovery from a vessel owner or operator (whether or not it is the employer) based on "unseaworthiness," for injuries within its coverage. *Id.* § 5(a), (b), 33 U.S.C. § 905(a), (b). It leaves the employer subject to tort liability for a covered injury only in the event the employer is

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[1] Act of Mar. 4, 1927, c. 509, 44 Stat. 1424, *as amended*, 33 U.S.C. §§ 901-50 ("Longshore Act").

also the owner or operator of the vessel aboard which the injury occurred, and was negligent in that capacity. *Id.* §§ 2(21), 5(b); *Jones & Laughlin Steel Co. v. Pfeifer*, 462 U.S. 523, 528-32 (1983).

The Act excludes from its "coverage," however, any "master or member of the crew of any vessel." Longshore Act § 2(3)(G), 33 U.S.C. § 902(3)(G). That exclusion thus preserves for crew members, in lieu of the Act's compensation remedy and limited right of recovery for "vessel" negligence, the otherwise available remedies under general maritime law and the Jones Act. *See generally McDermott, Inc. v. Wilander*, 498 U.S. 337, 347 (1991).

2. Respondent Michael Gros sustained a serious back injury on March 1, 1996, in the course of employment for Settoon Construction, Inc., aboard one of two Settoon Construction barges engaged in a pipelaying project on the navigable waters of the Atchafalaya Basin, within the state of Louisiana. Pet. App. 2, 30-31, 53. The workers'-compensation insurer of his payroll employer, Settoon, Inc., paid him compensation (and authorized limited medical attention at its expense) for some eleven months under the Louisiana Workers' Compensation Act, La. R.S. §§ 23:1031 *et seq.* Gros filed suit in Louisiana state court, asserting causes of action for maintenance and cure and for damages for negligence under the Jones Act or on the ground that the barge was "unseaworthy" – remedies dependent on his assertion that he was working as a member of the crew of the pipelaying barges at the time of the injury. In the alternative, he claimed damages for vessel negligence under § 5(b) of the Longshore Act. Gros also filed an administrative claim for benefits under the Longshore Act. Petitioner Settoon contested his status as a crew member in the tort action, and contested his status as a "maritime employee" within the coverage of the Longshore Act (*see* Longshore Act § 2(3), 33 U.S.C. § 902(3)) with respect to his compensation claim.

3. Gros's Longshore Act claim came before a Department of Labor administrative law judge ("ALJ") for hearing in December 2000 (Pet. App. 27), and the ALJ issued a "compensation order" (Longshore Act § 19(e), 33 U.S.C. § 919(e)) awarding compensation and medical benefits under the Act in April 2001 (Pet. App. 26-65). Settoon contended before the ALJ that Gros's injury was not within the Act's coverage because, although the injury occurred on navigable waters, Gros was not "engaged in maritime employment" within the meaning of Longshore Act § 2(3), 33 U.S.C. § 902(3). Pet. App. 46.[2] Even accepting without discussion or analysis the employer's focus on the portion of Gros's work performed aboard vessels during the entire "duration of his employment with [Settoon, Inc.]," the ALJ determined that he "spent at least five to ten percent of his time in . . . covered activit[ies], a 'not insubstantial' amount of his work on navigable waters, which was neither transient nor fortuitous," and hence *was* "engaged in maritime employment" within § 2(3). Pet. App. 53. Accordingly, after resolving other contested issues in Gros's favor, the ALJ awarded continuing compensation for temporary total disability from the date of the injury (subject to credit for the compensation paid pursuant to state law) and medical benefits. Pet. App. 64. At no point in the Longshore Act proceedings did Settoon assert that, even if Gros's employment was "maritime" within the meaning of the Act, still he was excluded from the Act as a "member of the crew of [a] vessel," Longshore Act § 2(3)(G), and the ALJ did not consider that question.

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[2] Settoon also contested whether Gros had suffered any residual back condition or consequent disability related to the injury beyond ten months after the injury, and whether he was entitled to payment of his medical expenses for treatment by one of his doctors thereafter (Pet. App. 46). The ALJ found in Gros's favor on those issues (Pet. App. 54-62), and Settoon did not appeal those findings.

4. Settoon Construction then moved the state trial court for partial summary judgment dismissing Gros's crew-member causes of action, i.e., all his claims except the one for vessel negligence under Longshore Act § 5(b), based on the ALJ's award of Longshore Act benefits. In November 2002, the court granted the motion, accepting Settoon's argument that by virtue of the entry of a formal award of benefits under the Longshore Act, Gros had "elect[ed]" the Longshore Act remedy to the exclusion of seamen's remedies otherwise potentially available to him (Pet. App. 24), and designated the partial summary judgment "final" for purposes of review. Pet. App. 12-13.[3]

On Gros's appeal, the Louisiana Court of Appeal, Third Circuit, reversed. Pet. App. 1-11. It described a conflict between authorities of the federal courts of appeals for the Fifth and Ninth Circuits on the effect of a formal award under the Longshore Act on an injured worker's continued right to seek remedies available to a crew member, and found the Ninth Circuit's reasoning more persuasive. It therefore held that on grounds of "policy, legislative intent, and the wording of the Longshore Act," an award under the Longshore Act does not *per se* affect the worker's right to a determination in a tort action of his assertion that he was a crew member. Pet. App. 10. The court of appeal further rejected Settoon's contention that the ALJ's findings establish that Gros lacked crew-member status as a matter of law because he did not spend at least thirty percent of his work time aboard a vessel or fleet of vessels:

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[3] Settoon also moved the trial court for summary judgment that, on the merits, the evidence showed that Gros lacked crew-member status as a matter of law and that there was no Longshore Act § 5(b) negligence; the trial court separately denied that motion, and did *not* declare that judgment "final" for appeal, so it was not reviewable in advance of full resolution of the case (La. Code Civ. Proc. Ann. art. 968).

> The [ALJ] specifically stated Gros spent '*at least* five to ten percent of his time in a covered activity, *which is enough to invoke coverage under the Act.*' [Pet. App. 53] (Emphasis added). Gros'[s] ability to prove seaman status under the Jones Act was not at issue.

Pet. App. 11.

The state supreme court denied Settoon's application for certiorari by a six-to-one vote. Pet. App. 66.

REASONS FOR DENIAL OF THE WRIT

I. Although the Issue of Federal Law on which Petitioners Seek Review Is the Subject of an Intercircuit Conflict and of an Intracircuit Conflict Between Federal and State Appellate Courts, This Is Not an Appropriate Time or Case for Its Resolution.

A. Scope of the Recurring Issue

It is now well-settled that the respective coverages of the Longshore Act and the Jones Act are mutually exclusive, because any worker whose injury *is* within the scope of the Longshore Act is generally foreclosed from tort remedies against the employer, except for that based on the employer's negligence in its capacity as owner or operator of a "vessel" that is asserted to have caused the injury, Longshore Act § 5(a), (b). *E.g.*, *McDermott, Inc. v. Wilander*, 498 U.S. 331, 347-48 (1991). It is likewise settled that the operative statutory phrase that defines the applicability of the Jones Act (and the availability of other "seamen's remedies") is "master or member of the crew of any vessel," Longshore Act § 2(3)(G) – a category that would be included in the Longshore Act's general definition of a covered "employee" as one who is "engaged in maritime employment," *id.* § 2(3), but that is

excluded from the definition, and the Act, by the crew-member exception. *E.g.*, *Wilander*, *supra*.

Despite this Court's recent attention to the question what legal content should be given to the phrase "member of the crew of any vessel,"[4] a substantial "twilight zone"[5] persists in which it is difficult to predict in advance of the conclusion of litigation whether a worker injured while working aboard a vessel is a crew member entitled to "seamen's" remedies (generally the remedies at issue here – "maintenance and cure" and recovery of full compensatory damages based on Jones Act negligence or "unseaworthiness") or a non-crew-member maritime employee restricted to limited workers-compensation remedies and Longshore Act § 5(b) negligence recovery. *See generally*, *e.g.*, John R. Wagner, Jr., *Applicability of Jones Act (46 U.S.C. [App.] 688) to Workers Connected with Operations of Dredges, Drilling Platforms, Derricks, or Similar Special-Purpose Equipment*, 92 A.L.R. Fed. 733 (1989 & 2004 Supp.); David W. Robertson, *The Supreme Court's Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases*, 34 J. Mar. L. & Comm. 547 (2003).

Whenever an admitted, disabling injury to such an "ambiguous amphibious worker"[6] occurs aboard a vessel owned

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[4] *McDermott, Inc. v. Wilander*, 498 U.S. 331 (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Chandris, Inc. v. Latsis*, 515 U.S 347 (1995); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997).

[5] This Court originally applied this phrase to a range of situations of *constitutional* uncertainty about the authority of the states to apply their workers'-compensation laws to injuries otherwise subject to maritime tort law. *Davis v. Department of Labor & Industries*, 317 U.S. 249, 256 (1942); *id.* at 262 (Stone, J., dissenting). It is here used in its common sense of an area of uncertainty along the border between two alternatively applicable bodies of law.

[6] Judge John R. Brown coined the phrase in *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 697 (5th Cir. 1963), and it has been used frequently since, particularly by the Fifth Circuit.

by the employer, it is clear that the worker is entitled to some remedy without proof of fault, intended to be provided without delay. It is not clear, however, whether such entitlement is in the form of wages to the end of the contract period as well as "maintenance and cure" until maximum medical recovery is reached (if he or she *is* a crew member),[7] or instead in the form of periodic benefits for disability and medical care by the worker's choice of physician under the Longshore Act. It is likewise clear that he or she has a further right to sue the employer for full compensatory damages (subject to credit for the payments previously provided), but it is not clear what grounds of liability are available – Jones Act negligence and unseaworthiness (if ultimately determined to be a crew member) or only ordinary maritime negligence of the employer in its "vessel" capacity (if found not to have been a crew member). To compound the complications, the particular circumstances of the worker and the injury determine which complex of remedies disfavors which party. The relative values of the various remedies obviously depend on how likely the differing bases of tort liability are to be established and the likely allocation of contributory fault to the worker. Perhaps less obviously, they also depend on the stage of the worker's working life at which the injury occurs, how long-term the resulting disability is likely to be, and the prominence of pain and suffering (extreme, long-term, or both) as an element of the damages that would be recoverable in tort but would add nothing to an award under the Longshore Act. In a great many cases, even when tort liability on one ground or another is clear, the Longshore Act remedy is the most generous potentially available; a tort recovery will be offset entirely against compensation that would have been payable anyway. In others, the potential

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[7] *See generally, e.g.*, 2 Martin J. Norris, *Law of Seamen* § 26-3 (5th ed. 2003); 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-29 (4th ed. 2004).

tort recovery far exceeds Longshore Act benefits. Respondent Gros believes his case falls in the second category, particularly if he is correctly classified as a crew member entitled to the grounds of recovery available to him as such.

The uncertain contours of crew-member status provide fertile ground for machinations by the parties – particularly, though not exclusively, by employers seeking to "squeeze" the worker out of access to seamen's remedies. The Longshore Act, like most state workers'-compensation laws, requires an employer aware of a disabling on-the-job injury to institute periodic compensation for disability, and to authorize medical care at its expense, without the need for any demand by the worker, unless it files a "notice of controversion" of his or her rights under the Act, specifying its grounds. Longshore Act § 14(a), (b), (d), 33 U.S.C. § 914(a), (b), (d). If the employer is concerned about potential seamen's remedies, it is hardly likely to assert that the worker has no rights under the Longshore Act because he or she was working as a crew member; it will usually report the injury as one covered by that act, and institute payments consistent with that position. It has long been settled that the worker's acceptance of such benefits has no effect on his or her right to pursue crew members' remedies. *E.g.*, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 91 (1991). But the employer may thereafter seek to encourage the worker to file a claim under the Act by prematurely terminating such benefits, in the hope that an award in a compensation order under the Longshore Act will be issued that will somehow foreclose the crew-member assertion in tort. *Cf. Simms v. Valley Line Co.*, 709 F.2d 409 (5th Cir. 1983).[8] The employer in the pre-

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[8] The employer in *Lewis v. SSA Gulf Terminals, Inc.*, BRB No. 03-0523 (Ben. Rev. Bd. Apr. 22, 2004) (http://www.dol.gov/brb/cases/lngshore-/unpublished/Apr04/03-0523.htm), *pet. for review filed*, No. 04-60543 (filed June 22, 2004), took another approach: it sought to force an ALJ adjudication of a claim under the Longshore Act, over the injured

sent case went a step further, denying that the injured worker's employment was "maritime" at all, and paying workers'-compensation benefits only under state law. The end result was the same: an award under the Longshore Act, without the employer ever having asserted in the Longshore Act proceedings that the worker was excluded from the Act as a "crew member," or the worker ever having asserted that he was *not*, and without any tribunal having considered the question.

B. The Conflict

Petitioners blatantly overstate their case in contending that the decision below conflicts with this court's decision in *Southwest Marine, Inc. v. Gizoni* (Pet. 4-8); but it is beyond cavil that there is a conflict in the lower courts on a question *Gizoni* left open: the effect of an injured worker's pursuit of, and acceptance of benefits under, an *award* in a Longshore Act "compensation order." The decision below extended that conflict from one between federal circuits (explicitly between the Fifth and Ninth Circuits) to one between a federal circuit and a state appellate court *within* that circuit.

In *Gizoni*, a ship-repair worker who spent much of his time, and was injured, aboard a barge used in his employer's shipyard operations "submitted a claim for, and received, medical and compensation benefits from [the employer] pursuant to the Longshore Act," without a compensation order

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worker's objection that in view of the Fifth Circuit's rule that a Longshore Act award forecloses seamen's remedies (*Sharp, infra*) he wanted to preserve his crew-member contention for presentation to a jury in his Jones Act action. The ALJ granted the worker's motion to stay the hearing on his Longshore claim pending the outcome of the Jones Act suit; on the employer's appeal from the stay, the Board affirmed (while expressing its disagreement with *Sharp*). The court of appeals has not yet ruled on its jurisdiction to review the Board's decision, which is arguably not a "final order" subject to review, Longshore Act § 21(c), 33 U.S.C. 921(c).

ever having been entered, and thereafter brought an action under the Jones Act asserting that he was a member of the barge's crew. 502 U.S. at 84. Although the Fifth Circuit had held that, as a matter of law, one working in an occupation enumerated as "maritime employment" in Longshore Act § 2(3) (such as Gizoni, a "ship repairman" within § 2(3) on any apparent reading) could not be a crew member, the Ninth Circuit disagreed, holding that such a worker is entitled to try to prove the requisite connection to a vessel (or fleet) for crew-membership status. *See id.* at 85 n.1. Besides agreeing with the Ninth Circuit on that issue (*id.* at 86-89), this Court unanimously turned aside two procedural arguments against allowing the worker to get to the jury with his Jones Act claim. First, it rejected the employer's argument that the Longshore Act tribunals should have "primary," or exclusive original, jurisdiction to decide questions of coverage under that Act, including the applicability of the crew-member exclusion (among other reasons, because the Act obviously does not contemplate such a rule, in that it includes an explicit provision that time limitations on assertion of a claim under the Act begin anew upon the denial of a tort remedy on grounds of Longshore Act exclusivity[9]). *Id.* at 89-91. And second, in the passage whose meaning and implications have divided the lower courts, the Court rejected the employer's

> . . . suggest[ion] that an employee's receipt of benefits under the Longshore Act should preclude subsequent litigation under the Jones Act. To the contrary, however, we have ruled that where the evidence is sufficient to send the threshold question of seaman status to the jury, it is reversible error to permit an employer to prove that the worker accepted Longshore Act benefits while awaiting trial. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37 (1963). It is by now 'universally accepted' that an

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[9] Longshore Act § 13(d), 33 U.S.C. § 913(d).

> employee who receives voluntary payments under the Longshore Act without a formal award is not barred from subsequently seeking relief under the Jones Act. G. Gilmore & C. Black, *Law of Admiralty* 435 (2d ed. 1975); see 4 A. Larson, *Workmen's Compensation Law* § 90.51, p. 16-507 (1989) (collecting cases); *Simms v. Valley Line Co.*, 709 F.2d 409, 412 & nn. 3 and 5 (5th Cir. 1983). This is so, quite obviously, because the question of coverage has never actually been litigated. Moreover, the Longshore Act clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the Longshore Act.[5] 33 U. S. C. § 903(e). See Gilmore & Black, *supra*, at 435.
>
> [5] For this same reason, equitable estoppel arguments suggested by *amicus* Shipbuilders Council of America must fail. Where full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. See *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984); *Lyng v. Payne*, 476 U.S. 926, 935 (1986). Argument by *amicus* would force injured maritime workers to an election of remedies we do not believe Congress to have intended.

502 U.S. at 91-92 & n.5.

Shortly thereafter, the Fifth Circuit considered *Sharp v. Johnson Bros.*, 973 F.2d 423 (1992), *cert. denied*, 508 U.S. 907 (1993), in which a worker was injured aboard a crane barge. The employer initiated Longshore Act benefits without any claim having been filed, but cut them off shortly after the worker filed an action under the Jones Act; he thereupon

filed a compensation claim, but the employer (despite answering in court that he was *not* a crew member) took the unusual step of denying Longshore Act liability on the ground that he *was* a crew member. 973 F.2d at 424. When the district court directed a verdict against him in the tort action on grounds that the crane barge was not a "vessel" and he was not a crew member, the worker pursued reversal of that judgment, which the Fifth Circuit granted (*Sharp v. Johnson Bros.*, 917 F.2d 885 (1991)). Meanwhile, however, back at the Department of Labor, along with the employer and its Longshore Act insurer, he entered into a settlement of his claim for Longshore Act benefits and any other claims against the employer other than those insured by its tort insurers, and an ALJ gave the settlement the required approval in a compensation order.[10] *Id.*

The district court, on remand, again dismissed the Jones Act action, this time based on the settlement-approval order, and the worker again appealed. *Id.* at 424-25. Describing the district court's reasoning in a manner presaging its own, the court of appeals first indicated that it had found that the approved settlement "constituted an election of remedies," but went on to say:

> The district court reasoned that the entry of an order by the ALJ constituted a finding that the injuries were compensable under the Longshore Act and that by seeking, and acquiescing to, the finding, Sharp is collaterally estopped from contesting Longshore Act coverage.

Id. at 425.

The Fifth Circuit affirmed. It distinguished *Gizoni* on the ground that Sharp had not merely accepted benefits and filed a claim under the Longshore Act, but had secured an *order*

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[10] *See* Longshore Act §§ 8(i), 16, 33 U.S.C. §§ 908(i), 916; 20 C.F.R. § 702.243.

making an award in the Longshore Act proceedings. It did not in any way address *Gizoni*'s explanations (quoted in full at pp. 11-12 *supra*) that the lack of preclusive effect in that case "is so, quite obviously, because the question of [crew membership] has never actually been litigated;" that the one-remedy theory was contraindicated by Longshore Act § 3(e)'s "credit" provision; and that an *equitable*-estoppel bar "would force injured maritime workers to an election of remedies we do not believe Congress to have intended." Instead, after acknowledging that "[i]t is true that Longshore Act coverage was never litigated in an adversarial proceeding," *Sharp* reasoned, "[t]here is a difference . . . between saying a plaintiff may pursue only one remedy and declaring that he may receive only one award." *Id.* at 426, 427. It did not examine or rely on any body of law relevant to the "election of remedies" doctrine, collateral estoppel, or equitable estoppel, and the opinion leaves it unclear whether it relied upon any such principle. Instead, it relied on the fact that the worker had "availed himself of the statutory machinery to bargain for an award, and he had the full opportunity to argue for (or against) coverage," and on its view that it was the "purpose" of the Longshore Act to "giv[e employers] limited and predictable liability in exchange for their giving up their ability to defend tort actions [*sic*; to avoid *any* liability by asserting tort defenses]." *Id.* at 426.[11] As the court explained it,

> Permitting a Jones Act proceeding after a formal compensation award here would defeat the purpose of the Longshore Act, as well as work unfairness, because, as here, employers often have different insurance carriers for workers' compensation claims

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[11] The *Sharp* court made no reference to the major qualification that limits the insured employer's tort immunity granted by LHWCA § 5(a): that if the employer is also the *owner or operator of the vessel* on which the injury occurs, it remains liable for negligence in that capacity (§ 5(b)).

> and tort claims, so the compensation insurer, by guaranteeing a minimum award, necessarily would reduce the ability of the tort insurer to effect a settlement.

Id. at 427.

Sharp cited no precedent at any level for its result, based on either a settlement or any other form of Longshore Act compensation order. No other reported decision appears ever to have so ruled.[12]

The Ninth Circuit in particular has gone the other way. In *Figueroa v. Campbell Industries*, 45 F.3d 311 (1995), the injured worker had settled claims under both the Longshore Act and state compensation law for an injury sustained aboard his employer's shipyard tugboat. He then filed an admiralty action seeking crew members' remedies (but acknowledging the appropriateness of an "offset" for his compensation recoveries). *Id.* at 313. A jury found that he was indeed a crew member, and the employer appealed from the resulting award of damages. *Id.* Without mention of *Sharp*,[13] the court held that its own and this Court's opinions in *Gizoni*

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[12] The only other authority on point cited by Petitioners is *Anders v. Ormet*, 874 F.Supp. 738 (M.D. La. 1994), Pet. 15. But *Anders* was decided under the controlling precedent of *Sharp*. Further, unlike that in the present case, the ALJ's award in *Anders* explicitly found non-crew-membership, and the court described the issue as having been litigated between the parties before the ALJ.

In *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 1993 WL 668784 (D. Minn. Jun 18, 1993) (No. Civ. 3-91-646), *aff'd*, 25 F.3d 707 (8th Cir. 1994), the district court dismissed at the summary judgment stage on grounds that the plaintiff was not a crew member as a matter of law, and added that based on *Sharp* the issue was also foreclosed by a settlement under the Longshore Act; but the court of appeals "affirm[ed] on the former issue, and d[id] not address the latter," 25 F.3d at 708.

[13] Apparently the employer did not cite *Sharp* to the court. *See id.* at 316 ("Appellant cites no cases holding otherwise.").

controlled against the employer's collateral-estoppel argument. Part of the court's opinion proceeds on the questionable premise that this Court's resolution of *Gizoni* meant that workers who are crew members but also performing jobs expressly enumerated in the main clause of Longshore Act § 2(3) (longshoring and shipyard workers) are *entitled to* both Longshore Act and Jones Act status, with the right to recover both remedies serially (subject to credit against a later remedy for amounts recovered pursuant to the other). *Id.* at 315.[14] But the court also relied on an analysis of the limitations on the applicability of issue preclusion under the "collateral estoppel" doctrine, finding that

> Courts that have addressed the precise issue of whether the jurisdictional issue must be actually litigated for estoppel to apply in this situation have found that if the jurisdictional issue was not contested and no finding was made at the administrative level, a plaintiff is not estopped from bringing a Jones Act claim.

Id. at 316, *citing Guidry v. Ocean Drilling & Exploration Co.*, 244 F.Supp. 691 (W.D. La. 1965), and *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). Since no finding on crew-member status had been made in the Longshore

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[14] Respondent Gros does not rely on any such theory, which appears to be contrary to the thrust of *Gizoni* – that even a worker engaged in longshoring or shipyard work may have the requisite connection to a particular vessel or fleet, whose "mission" is such work, to be a crew member, *and thus excluded from* the coverage of the Longshore Act, and is entitled to an opportunity to show such relationship so as to have access to crew members' remedies in tort. That question, however, has no bearing on this case; neither marine oil and gas work in general nor pipelaying in particular is among the activities expressly enumerated as parts of "maritime employment" within Longshore Act § 2(3), so even under the *Figueroa* reading Gros, if a crew member, was outside of the Longshore Act.

Act proceedings, there was nothing to estop litigation of that issue in the Jones Act proceedings. *Id.* at 315-16.[15]

Again in *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203 (9th Cir. 1995), *rev'd on other gr.*, 520 U.S. 548 (1997),[16] the court denied preclusive effect to an award under the Longshore Act. As this Court will remember, the injured worker there was a "deckhand" hired by the day out of a union hiring hall to perform a variety of daily assignments aboard harbor tugs owned by several different operators. Some of these daily assignments were sea-going; others, such as that in the course of which the injury occurred, were confined to maintenance work while the tug was at berth. The district court granted summary judgment dismissing his Jones Act and unseaworthiness counts, ruling that he lacked crew-member status as a matter of law when injured, and he was required to await resolution of his alternative tort count, for negligence of the vessel under Longshore Act § 5(b), before obtaining appellate review of that judgment. He then sought an award under the Longshore Act. The employer had never asserted as a defense against Longshore Act liability the proposition that, contrary to its position in the tort action (and the success that position had already enjoyed before the district court), the worker was excluded from the Act as a crew member; indeed, it had been paying some benefits under the Act from the time of the injury forward. 67 F.3d at 205. Nevertheless, at the hearing convened before the ALJ on other issues (concerning the amount payable under the Act), it asserted that he

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[15] The same rule – no preclusion by a prior compensation award unless it included a litigated decision on the issue – prevails in the context of the border between state workers'-compensation laws and the Federal Employers' Liability Act, 45 U.S.C. § 51 (the very statute the Jones Act extends to "seamen"), i.e., the "interstate commerce" inquiry. *See generally* 32B Am.Jur.2d *Federal Employers' Liability and Compensation Acts* § 53.

[16] The decision of this Court is addressed at p. 18 *infra*.

"*may* have been a Jones Act seaman"; and despite the fact that neither party had even *asserted a* position on the merits of that question (much less actually litigated it), the ALJ addressed it. *See* Pet. App. 34a-35a, *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997) (No. 95-1621). He found that the issue was not precluded by the district court's summary judgment because the ruling was interlocutory and had not become final, but agreed with the district court that the claimant-plaintiff was not working as a crew member when injured. *Id.* at 35a n.2, 37a. After resolving the issues that *were* litigated, the ALJ entered an award of continuing Longshore Act benefits.

The district court found that there was no § 5(b) negligence, and on appeal the worker challenged the district court's non-crew-member ruling. The defendant employer asserted in support of the challenged ruling that the ALJ's decision foreclosed relitigation of crew membership, but the court of appeals rejected that argument. It did not rely on *Figueroa*, noting that it had "reached the same result for different reasons." 67 F.3d at 208 n.6. Instead, it focused on this Court's reasoning in *Gizoni*, the policies that reasoning implicated, and the support of the Longshore Act § 3(e) credit provision and scholarly authority cited in *Gizoni*. These led it to the conclusion that the litigation of the Longshore Act claim to a formal award should not bar litigation of the crew-member question before the tort tribunal. *Id.* at 207-08. It relied particularly on two observations: first, that the parties' interests on the issue were reversed in the two proceedings, so as to deprive them of a motive for vigorous litigation of their purported positions on it in the compensation tribunal; and second, that – contrary to the purpose of the Longshore Act to deliver benefits without the delay incident to litigation except where the worker's rights under the Act are genuinely controverted – "imposing such a bar would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing

from suit an employer who forces his employee to seek compensation through litigation." *Id.*

Finally, although neither the court below nor Petitioners have mentioned it, this Court granted *certiorari* in *Papai* to resolve not only an intercircuit conflict with respect to the merits of the crew-member test applied by the Ninth Circuit (which combined the worker's various assignments for all three employers who hired him out of his union hiring hall to work on their harbor tugs, and treated all those tugs as a "fleet," in determining whether he bore the necessary relationship to a fleet of vessels), but also the conflict between *Sharp* and *Figueroa* and *Papai* on the preclusive effect of an award under the Longshore Act. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 550 (1997). But the majority resolved the substantive issue against the Ninth Circuit's multi-employer "fleet" approach, and hence found the worker to have been employed as a non-crew-member as a matter of law on the day of the injury; "as [that ruling] is dispositive of the case," the Court explicitly declined to reach the preclusion issue. *Id.* The dissenting opinion expressed agreement with the Ninth Circuit's view on the preclusion issue, however, on that court's *Gizoni*-based reasoning. *Id.* at 563 n.2.

The court below recognized the federal intercircuit conflict on the issue, and followed the Ninth Circuit's *Papai* reasoning. Pet. App. 5-11.

C. Prematurity of Resolution of the Issue Now

Respondent recognizes that the *correctness* of the decision below, and the error of *Sharp* to the contrary, are beside the point at the present stage, as those circumstances do not affect the need for this Court's intervention to resolve an existing conflict on a frequently recurring issue of federal law, both between federal circuits and between federal and state appellate courts within the Fifth Circuit. Neither the present

time nor the present case, however, is opportune for its resolution.

First, this Court may well substantially clarify the border between crew-member and Longshore Act status – and thus limit the importance of the issue on which the conflict exists – in a case now under consideration. Probably the most substantial area of the current uncertainty about the border between the Jones Act and the Longshore Act concerns the "special-purpose vessels" that may be classified as "work platforms" that do not constitute "vessels" capable of having "crews" within the meaning of Longshore Act § 2(3)(G). The "vessel" status of such workplaces is before the Court in *Stewart v. Dutra Construction Co.*, No. 03-814 (U.S., cert. granted Feb. 23, 2004), *reviewing* 230 F.3d 461 (1st Cir. 2000), *after remand*, 343 F.3d 10 (2003), scheduled for argument November 1, 2004. The smaller the area of uncertainty about the scope of crew-member status that survives the decision of the Court in *Stewart*, the less significant will be the existing conflict on the effect of an award under the Longshore Act on an injured ambiguous worker's right to a determination of such status in a judicial tribunal.

Second, neither the apparent view of the Fifth Circuit nor the view of the Louisiana courts is cast in stone. Most particularly, the Fifth Circuit's ruling in *Sharp* appears to have been heavily influenced by pique at counsel's lack of "candor and respect" in failing to bring the Longshore Act settlement to the court's attention when the case was before the court the *first* time. *See Sharp*, 973 F.2d at 427 n.3.[17] That court

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[17] The court's irritation despite the acknowledged fact that, based on the plain and expressed intent of parties to the settlement that it not affect the liabilities at issue in the pending tort action, they "may legitimately have believed that the Longshore Act settlement was irrelevant to the Jones Act action," *id.*, was perhaps greatly amplified by the fact that its opinion on the first appeal, 917 F.2d 885 (1991), opened a significant schism in Fifth Circuit precedent on the scope of the "work platform"

has not had the opportunity to reconsider *Sharp* in a case in which counsel have been satisfactorily forthright. Nor has it addressed the issue since other courts have reached a contrary conclusion and scholarly commentary has condemned it.[18] Thus, if (as we believe) the Fifth Circuit's lone decision holding that an award under the Longshore Act, even by way of approval of a settlement, without litigation or decision of the crew-membership issue is wrong, that court may well correct its own error without the need for this Court's intervention. At a minimum, any revisitation of the issue by that court would likely clarify what legal theory or doctrine the preclusion-by-award rule rests on.

Likewise, the decision below represents binding precedent only in Louisiana courts within the state's Third Circuit. If, as Petitioners contend, the decision is in error, another circuit of the Louisiana courts of appeal would be free to disagree with it, setting the stage for correction of the putative error of the decision below by the Louisiana Supreme Court. Although such action would do nothing to resolve the existing federal intercircuit conflict, it would eliminate the particularly pressing need to resolve the present in*tra*circuit conflict, without the need for action by this Court.

Further still, this is not an appropriate case for the Court to resolve the existing conflict because it does not represent the full scope of that conflict. The Ninth Circuit has held that

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exception to crew membership (*see, e.g.*, Jack L. Allbritton & David W. Robertson, *Seaman Status After Chandris, Inc. v. Latsis*, 8 U.S.F. Mar. L.J. 29, 50 & n. 156, 52-53 (1995)).

[18] *See* Victoria L.C. Holstein, Comment, *The Overlap Preclusion Trap Between the Jones Act and the Longshore and Harbor Workers' Compensation Act*, 76 Tul. L. Rev. 783 (2002). *See particularly, e.g., id.* at 815 (*Sharp* "is unsupported by traditional common law preclusion principles and contradicts the Supreme Court's reasoning in *Gizoni*, which, at a minimum, required a finding of nonseaman status [in the Longshore Act proceedings] to trigger preclusion.")

even a direct, explicit finding by an ALJ, in proceedings on a claim under the Longshore Act, that the claimant was not a crew member does not preclude *de novo* consideration of that issue in a tort action. *Papai*, discussed at pp. 16-17 *supra*. There was no such finding in the Longshore Act proceedings in this case (and see Part II *infra*). The significant issue that was unnecessary to address in *Gizoni* (because the crew-member issue "ha[d] never actually been litigated" in Longshore Act proceedings in that case), and that was before the Court but left unresolved in *Papai*, is whether a *finding on the same issue* in Longshore Act proceedings has the necessary "finality" in the Longshore Act's own scheme, and enough indicia of a reliable full and fair litigation of the issue by parties with a sufficient stake in its outcome, to be given preclusive effect in subsequent judicial proceedings, under general principles of "administrative estoppel" and traditional "collateral estoppel."[19] This case does not present that issue. Affirmance of the decision below in the present case by this Court could readily be based on the ground that here, as in *Gizoni*, the crew-member issue "has never actually been litigated," so there is no finding on the relevant issue that could be given issue-preclusive effect even if ordinary administrative-estoppel principles should govern. This would correct the aberrant Fifth Circuit rule in *Sharp*, which can only rest on some sort of "election of remedies" theory that is plainly

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[19] *See generally Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991); Longshore Act § 22, 33 U.S.C. § 922 (findings of fact in a compensation order under the Longshore Act are subject to change, throughout the term of an award, or on motion made within a year after a last payment or a denial of the claim, for mere "mistake" – even based "merely [on] further reflection on the evidence initially submitted," *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)); *see also Restatement (Second) of Judgments* § 28(5)(c), at 273-274 (1982) (issue preclusion is inappropriate where the party to be precluded did not have an adequate incentive in the initial action to litigate vigorously his present position).

inconsistent with the reasoning of *Gizoni* (502 U.S. at 92 n.5). But that would leave unresolved the further important dimension of the existing conflict, as represented by the Ninth Circuit's decision in *Papai*: whether an *explicit non-crew-member finding* in Longshore Act proceedings has issue-preclusive effect.

Finally, although the ruling below, that Gros's Longshore Act award does not foreclose him from continuing to contend in his tort action that he was a crew member when injured, is "final" in the sense that that proposition of federal law will not be further considered by the state courts in his case, it may turn out not to have any effect on the ultimate disposition of his crew-member action. In the trial-court proceedings that will follow on remand (either in the absence of intervention by this Court or in the event the Court affirms the court of appeal's ruling), any of several possible outcomes could moot the preclusion issue in this case. First, a jury might find that Gros was not a crew member. And second, *regardless* of how it rules on that issue, the jury might find that his injury resulted from ordinary maritime negligence of Settoon Construction in its capacity as owner and operator of the pipelaying vessel, entitling Gros to recover the same damages under Longshore Act§ 5(b) as a non-crew-member *or* under the Jones Act or general maritime law as a crew member. In the event of any such outcome, the issue on which Petitioners seek this Court's present review would have no practical effect, beyond presentation of the crew-member status issue for determination in the trial court. Under such circumstances, although this Court has *authority* to grant review at the present juncture, it should allow this case to go forward to conclusion. If, upon final disposition, Petitioners are adversely affected by the ruling below – i.e., if the jury has found that Gros was a crew member, and awarded damages under a Jones Act or unseaworthiness standard but not on a maritime-common-law negligence basis –, and if the issue-preclusion question remains in conflict in the lower

courts at that time, this case would be in a far better posture for this Court's attention than it is now.

II. Petitioners Misstate the ALJ's Findings in Contending that They Establish that as a Matter of Law Gros Could Not Have Been a Crew Member.

Petitioners purport to present a second question for the Court's consideration:

> Whether a finding of fact by an ALJ for the Department of Labor which determines that a longshoreman spent 5-10% of his relevant work history on navigable waters precludes a claimant from relitigating this issue in a subsequent proceeding based on the Doctrine of Collateral Estoppel.

Pet. i. But no such question can be presented by this case, for the ALJ did not make the stated finding, and even if he had it would not foreclose crew-member status because the "relevant work history" would be markedly different for purposes of crew membership than it was in the context of whether Gros's employment was "maritime" within the Longshore Act.

Petitioners begin their argument directed to this point (Pet. 13-17) by quoting accurately the finding of the ALJ, based on examination of Gros's entire course of work over the years for Settoon, primarily as a "vacuum truck driver," that Gros spent "*at least* five to ten percent of his time in a covered activity, a 'not insubstantial' amount of his work on navigable waters, which was neither transient nor fortuitous." Pet. App. 53, *quoted*, Pet. 13 (emphasis added). Again, no one ever asserted in the Longshore Act proceeding that Gros was excluded from the Act as a crew member; the ALJ's finding was made for purposes of the determination whether Gros's employment was "maritime" so as to be within the Longshore Act or non-maritime so as to be within Louisiana

compensation law. But Petitioners then premise their argument on the assertion that the ALJ made "a factual determination . . . that [Gros] spent *somewhere between* 5-10% of his time working on a vessel." Pet. 14. Indeed, two pages later this misstatement has grown a pair of quotation marks and a purported citation (and propelled Gros overboard): the ALJ "made a specific finding of fact that Mr. Gros *'spent somewhere between 5-10% of his time in navigable waters'*. (App. 53)." Pet. 16 (emphasis added). Plainly, the ALJ made no such finding. *Cf.* S. Ct. Rule 14.4.

The legal premise of Petitioners' collateral-estoppel contention is no more valid than its factual premise. It submits that under *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), as a matter of law a worker cannot have the "substantial connection" to a vessel (or fleet under common ownership or control) necessary for crew membership if he "spends less than approximately thirty percent . . . of his time" aboard. Pet. 14. But *Chandris* made clear, and *Papai* emphasized, that the worker's entire course of assignments during his or her full tenure with the employer may not be the appropriate frame of reference, and that the thirty-percent "rule of thumb" would be inappropriate in some cases, *particularly in the event of a new assignment with different duties*:

> [W]e see no reason to limit the seaman status inquiry ... exclusively to an examination of the overall course of a worker's service with a particular employer. . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.

Chandris, 515 U.S. at 371-372. As the Court explained in *Papai*, this meant that "the employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured *on a new assignment* with th[at]

employer, an assignment *with different 'essential duties'* from his previous ones." 520 U.S. at 556 (emphasis added).

Obviously the determination in the trial court whether Gros was working as a member of the crew of the pipelaying barge at the time of his injury is likely to turn, under these authorities, on whether he was working for a different "particular employer," or at least was on a different "assignment," while "lent" by Settoon, for whom he had worked primarily as a vacuum-truck driver – sometimes being ferried aboard a barge to oil- and gas-well sites but mostly driving to well sites ashore – to Settoon Construction to lay pipe aboard a barge, an entirely "sea-based" job in the sense that it was performed aboard a vessel away from shore. The merits of that question are, of course, far from being before this Court for any consideration; but it is critically significant that the question is an entirely different one from that addressed by the ALJ, for purposes of the Longshore Act, without any attention to the question of the appropriate timeframe (nor any need for such consideration, since even on the broadest possible consideration Gros's cumulative presence aboard vessels was "not insubstantial," Pet. App. 53). The basic facts found by the ALJ – which are not, in fact, in any dispute – may well establish that *in his work as a vacuum-truck driver*, even while he and his truck were en route on a barge to marine wells, he was not a member of the barge's crew. But he was working for a different employer, with entirely different duties, when injured, a fact with no Longshore Act "maritime employment" consequences but of potentially determinative importance to the crew-member question.

Petitioners' contention that the Court should address in this case whether an ALJ's actual findings of basic fact have issue-preclusive effect is thus based on incorrect factual *and* legal premises. The ALJ did not make the finding Petitioners assert, and made no findings "on the same issue" as those relevant to Gros's crew-member status – i.e., on his relation-

ship to the Settoon Construction pipelaying barge during the tenure of his employment with that company on the pipelaying job, and whether that was a relevant "new assignment" within the meaning of this Court's Jones Act authorities.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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